Supreme Court, U.S.
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No. 92-1719

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MICHAEL BOURGAL, JOHN PROBEYAHN, BEN CIAVOLELLA, JR., IANIELLO MADONNA, THEODORE KING, CHESTER BROMAN, FRANK FINKEL and JOSEPH FERRARA, as Trustees and Fiduciaries of the Local 282 Welfare, Pension, Annuity and Job Training Trust Funds,

Petitioners,

vs.

SALVATORE CERVONI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT M. ZISKIN
Attorney for Respondent
6268 Jericho Turnpike
Commack, New York 11725
(516) 462-1417

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Under what circumstances, if any, is a Corporate Officer personally liable for employee trust fund contributions that should have been made by the Corporation as required by the Employee Retirement Income Security Act of 1974?

2. Whether the Second Circuit correctly applied the well-established choice of law to the particular facts of this case, in holding that the Corporate Officer had no personal liability for the ERISA obligation of the Corporation?

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OPINIONS BELOW

The opinions below are set forth in the Appendices to Petitioners' Petition for Writ of Certiorari.

PARTIES

The caption of the case in this Court contains the names of the present Trustees and Fiduciaries of the Local 282 Welfare, Pension and Annuity Trust Funds.

The parties to the proceedings in the District Court and in the United States Court of Appeals for the Second Circuit were Robert Sasso and Theodore King, named Trustees. Salvatore Cervoni, the sole shareholder, officer and director of Key Way Concrete Supply Corp., was the sole defendant in the proceedings before the Second Circuit Court of Appeals.

STATUTES INVOLVED

Section 515 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. Section 1145, states:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

Section 3(5) of ERISA, 29 U.S.C. Section 1002(5), states:

> The term 'employer' means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

Section 3(9) of ERISA, 29 U.S.C. Section 1002(9), states:

> The term 'person' means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association or employee organization.

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RESPONDENT'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

The Local 282 International Brotherhood of Teamsters, Welfare, Pension and Annuity Trust Funds are multiemployer benefit plan trusts organized and operated in accordance with the Employee Retirement Income Security Act of 1974,

("ERISA"). They are jointly administered by representatives of employers and employees engaged in commerce. Such funds provide fringe benefits to employees performing services within the trade and geographical jurisdiction of Local 282 of the International Brotherhood of Teamsters (Local 282).

Key Way Concrete Supply Corp. ("Key Way") is a corporation which maintains its place of business in St. James, New York, where it is engaged in the sale of ready mixed concrete.

Salvatore Cervoni is the sole officer, director and shareholder of Key Way.

During the course of its business operations, Key Way became obligated by the terms of the collective bargaining agreement to make trust fund contributions to the Local 282 Welfare, Pension and Annuity Trust Funds.

As alleged in Petitioners' complaint and amended complaint, Key Way became indebted to such trust funds for unpaid fringe benefit contributions covering the period February 23, 1989 through July of 1990.

Neither Petitioners' complaint nor amended complaint alleged that Cervoni or any other corporate officer or official or representative of Key Way engaged in any fraudulent activities of any kind with respect to the operation of Key Way and/or with respect to the payment of fringe benefit contributions. Likewise, neither the complaint nor amended complaint in any manner alleged any factual basis which would warrant a Court to "pierce the corporate veil" so as to place personal responsibility for the non-payment of fringe benefit contributions upon Cervoni.

The collective bargaining agreement signed by Key Way with Local 282 did not provide that corporate officers, agents or representatives would become personally liable in a situation where the corporation failed to make timely payments of fringe benefit contributions. Neither by the terms of the collective bargaining agreement or by any other instrument

did Cervoni agree to guarantee Key Way's payments to the fringe benefit funds. Likewise, the provision of the fund trust indentures do not impose liability upon corporate officers of those corporations who fail to make timely contributions to the benefit funds.

Although it is undisputed that Key Way failed to make fund contributions during the months of February through July of 1990 while continuing to operate its ready mix business and employ drivers, neither Local 282 nor Petitioner took any affirmative steps to prevent Key Way from steadily increasing its mounting trust fund obligations.

REASONS FOR DENYING CERTIORARI

Petitioners present no conflict of interest among the circuits or between the Federal Circuit's decisions and a decision of a State Court of last resort; nor is there any State Court decision involved.

To the contrary, the Second Circuit's decision in this case joins the six other Circuit Court of Appeals to have addressed this issue.

Essentially, the Second Circuit's decision in this case is limited to the facts set forth therein, and it is highly unlikely that a case such as this will arise again.

In the circumstances of the instant case, Petitioners have sought to convince this Court as well as the Court below that a broad interpretation should be given to ERISA's definition of "employer", 29 U.S.C. Section 1002(5).

The Second Circuit specifically adopted the reasoning of the First Circuit and concluded that "the issue is not whether Cervoni falls within ERISA's definition of 'employer', but whether he is an 'employer' who is obligated to make contributions to a 'multiemployer plan'."

Specifically, the Second Circuit adopted the reasoning of Judge Breyer in *Massachusetts Laborers' Health and Welfare Fund v. Starrett Paving Corp.*, 845 F. 2d. 23 at 25-26 which held:

> . . . The statute's language clearly states that the duty in Section 1145 arises only with respect to 'employers obligated' to make contributions. Although

> Starrett's corporation may have been 'obligated' to make the contributions, Starrett personally was not. For another thing, the legislative history of Section 1145 indicates that the language means what it says. When Congress enacted the provisions in 1980, the Senate Committee on Labor described it as follows:
>
> The public policy of this legislation . . . mandates that provision be made to discourage delinquencies and simplify delinquency collection. The bill imposes a Federal Statutory duty to contribute on employers that are already contractually obligated to make contributions to multiemployer plans.

Having traced the history of the Multiemployer Pension Plan Amendments Act of 1990, the Court of Appeals for the First Circuit in *Starrett Paving*, *supra*, at page 25 went on to hold:

> One who would be obligated to make a payment in the absence of ERISA might be one 'already obligated', but one who, like Starrett, has no such prior, independent obligation is not.

In its further consideration of Section 1145 and 1002(5), the First Circuit at pages 25 and 26 set forth the following relevant factors in connection with its interpretation of Section 1002(5) and Section 1145.

01. That as an employer is not contractually obligated to contribute to a plan once the relevant collective bargaining agreement has expired, Section 1145 does not permit a plan to sue for contributions. In this regard the Court concluded that Section 1145's thrust was to permit a plan to sue for contractually obligated delinquent contributions as opposed to suing with respect to an employer's statutory obligations.

Additionally, the First Circuit observed that a literal reading of the broad definition of the word "employer" found in Section

1002(5) in relationship to Section 1145 would nevertheless make a substantial difference in connection with an analysis of other provisions of ERISA. Thus, it was concluded that a literal reading of the definition of "employer" would not render meaningless its broad definition as found in Section 1002(5).

02. With regard to the concern that a literal reading of Section 1145 would not permit corporate veil piercing, the Court held "when State Law pierces the corporate veil where the owner is the corporation's alter ego where State or other relevant Federal Law makes the owner liable, it is fairly easy to say that the owner is the corporation and that the owner is therefore an "employer" (under ERISA's definition) "who is obligated" "to make contributions to" a pension plan.

With regard to the contention that like the Fair Labor Standards Act ("FLSA"), ERISA aims to protect workers by securing the payments due them, the Court observed that "an ERISA-type fund" is not necessarily as helpless when faced with a financially shaky, but closely held, corporation as is a worker seeking payment of a minimum wage. In this connection the Court concluded that a worker entitled to ERISA protected pension fund payments may find it easier through his/her Union to secure a written promise of personal liability from the owner of a shaky corporation.

In any event, the First Circuit concluded that the "general considerations of need" did not carry it "beyond the statute Congress wrote."

In response to the contention that a literal interpretation of Section 1002(5) does not render the statute meaningless, the First Circuit observed that the definition still applies to other parts of ERISA. In this regard the Court observed "as we have also pointed out, even if the class of persons liable under Section 1145 is the same as those already liable under State (or some other) law, Federal liability means easier collectibility because of ERISA provisions for, e.g., attorneys' fees, liquidated damages and interest. Thus the Court held that it must interpret the statute in accordance with its 'plain meaning'."

The Court of Appeals for the Second Circuit aptly stated . . .

> "as it remains for future decision to demarcate the area of individual liability for corporate ERISA obligations, we are satisfied that nothing in the present record provides a basis for imposing personal liability upon Cervoni. He did not act in concert with a fiduciary to breach a fiduciary obligation, he did not commit fraud, and there is no claim and no basis in the record to support a claim that the corporate veil of Key Way should be pierced on the theory he *is* the corporation or its alter ego. His liability is sought to be established simply because of his dominant role in the affairs of a corporate employer. If individual liability for ERISA obligations is to be imposed on those in such a role, Congress must supply the remedy."

CONCLUSION

For all of the foregoing reasons, Certiorari should be denied.

Dated: Commack, New York
May 19, 1993

Respectfully submitted,

ROBERT M. ZISKIN
Office and P.O. Address:
6268 Jericho Turnpike, Suite 12A
Commack, New York 11725
(516) 462-1417

Attorney for Respondent